

IF MEN WERE ANGELS

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In *The Federalist*, James Madison wrote, with characteristic elegance and insight:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹

Scott Gerber's *A Distinct Judicial Power*² is a wonderful exploration of one of Madison's "auxiliary precautions."

Professor Gerber traces the evolution of the concept of separation of powers from Aristotle to the creation of the Federal Constitution. In particular, Professor Gerber considers the idea of a judicial branch of government independent from the other branches. The major part of his analysis carefully explores the development of an independent judiciary in each of the original colonies and states.³

James Madison surely saw an independent judiciary as one of the "auxiliary precautions" necessary to control the government's exercise of power, but, to him independence was simply a means to an end. One of the Constitution's primary structural precautions against misuse of government power is the separation of powers.⁴ If the judiciary is to operate as an effective check on the legislative and the executive branches, the judi-

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1. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

2. SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1607-1787 (2011).

3. See *id.* at 39-321.

4. See *id.* at 35-36.

ary must have some measure of insulation from the enormous power wielded by the other two branches of government.

In the book's concluding chapter, Professor Gerber takes up the issue of judicial review and convincingly details the relationship between judicial independence and the power to enforce a constitution by nullifying unconstitutional actions.⁵ The power of judicial review is an important aspect of constitutional governance, but our modern preoccupation with this power can obscure other, perhaps more important, benefits of judicial independence.

I. AMERICAN PLURALISM

Pluralism has been a constant in American history from the seventeenth century to the present. To be sure, many colonies (and later states) strove throughout the eighteenth century to ensure a measure of judicial independence.⁶ Nevertheless, other colonies and states made no effort to create structural safeguards that would protect judges from executive and legislative intrusions.⁷

During much of North Carolina's colonial existence, there were constant disputes between the royal governor and the general assembly over control of the courts.⁸ In reaction to this experience, the North Carolina Constitution of 1776 explicitly provided "[t]hat the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."⁹ Moreover, the North Carolina Constitution provided specific structural safeguards to assure judicial independence. The judges of the primary courts were to "hold their offices during good behavior" and to receive "adequate salaries during their continuance in office."¹⁰ Notwithstanding this guarantee, the legislature did not always provide an adequate salary.¹¹ Some leading North Carolina political figures embraced the concept of judicial review and expressly noted the relationship between judicial review and judicial independence. In 1781,

5. *See id.* at ch. 16.

6. *See id.* at 41, 48–49, 67 (Virginia).

7. *See id.* at 143, 238–39 (Connecticut and New Jersey).

8. *See id.* at 185–98.

9. *Id.* at 202.

10. *Id.* at 203.

11. *See id.* at 204–05.

Governor Burke urged that without judicial review “civil liberty would be deprived of its surest defences against the most dangerous usurpations, that is the independency of the Judiciary power and its capacity of protecting Individuals from the operation of Laws unconstitutional and tyrannical.”¹² Five years later, James Iredell took the same position.¹³

New Jersey stands in stark contrast to North Carolina. The New Jersey Constitution of 1776 is a flat rejection of separation of powers. Instead, New Jersey opted for legislative supremacy and made the judiciary dependent upon the legislature.¹⁴ The state did not officially embrace a concept of judicial independence until the Constitution of 1844.¹⁵

Connecticut is another colony, then state that displayed little interest in creating a constitutional structure to ensure judicial independence. Indeed, the state had no written constitution until 1818.¹⁶ Colonial “Connecticut paid no attention to the niceties of separation of powers,”¹⁷ and this situation continued in early statehood. Superior judges’ tenure was subject to annual reappointment by the general assembly.¹⁸ In addition, the courts’ individual judgments were subject to review by a Supreme Court of Errors consisting of the lieutenant governor and the upper house of the legislature.¹⁹ Finally, an individual judgment also was subject to review through special legislation in the general assembly that could reverse the judgment.²⁰

Connecticut’s rejection of separation of powers and judicial independence was, in significant part, a function of the thoroughgoing Calvinism that predominated among the state’s political elite. When James Madison wrote, “If angels were to govern men, neither external nor internal controls on govern-

12. *See id.* at 206.

13. *See* William R. Casto, *There Were Great Men Before Agamemnon*, 62 VAND. L. REV. 371, 378–85 (2009).

14. GERBER, *supra* note 2, at 236–37.

15. *See id.* at 238–40.

16. *Id.* at 143; *see also* Wesley W. Horton, *Connecticut Constitutional History 1776–1988* (August 1988), <http://www.cslib.org/cts4ch.htm>.

17. GERBER, *supra* note 2, at 150 (quoting ROBERT J. TAYLOR, *COLONIAL CONNECTICUT: A HISTORY* 39 (1979)).

18. *Id.* at 153.

19. *Id.*

20. *See id.* at 153–54.

ment would be necessary,"²¹ he was writing rhetorically. In contrast, one of the fundamental doctrines of Connecticut's New Divinity Calvinism was that, indeed, angels—actually God, himself—ruled the entire world, including Connecticut.²² These Calvinists believed that all human affairs are minutely predestined. Everything, including the state's rulers, was part of God's plan.²³ For example, Oliver Ellsworth, the state's most prominent national politician, believed he had been selected by God to serve in the United States Senate.²⁴ Given this extreme version of predestination, there was no particular need to guard against government misconduct in Connecticut. In the view of the state's largely Calvinist rulers, it sufficed that Connecticut was governed by righteous rulers.

II. JUDICIAL REVIEW

Professor Gerber's concluding chapter on the relationship between judicial review and judicial independence is a masterful capstone to his meticulous state-by-state exploration of judicial independence. He presents a linked "triumvirate" of separation of powers, judicial review, and judicial independence. The Founders believed that government abuse could be limited by separating the powers of government into three co-equal branches and that the judicial branch would curb misconduct by the legislative and the executive branches.²⁵ An important part of the judiciary's participation in this balance of powers scheme was the power to refuse to give effect to unconstitutional misconduct by the other branches through judicial review.²⁶ Finally, the power of judicial review would be significantly less effective if the other branches could effectively control the judiciary.²⁷ Hence arose the need for judicial independence.

Some might quibble with particular details of Professor Gerber's concluding analysis. For example, delegates like James

21. THE FEDERALIST NO. 51, *supra* note 1, at 322 (James Madison).

22. See William Casto, *Oliver Ellsworth's Calvinism: A Biographical Essay on Religion and Political Psychology in the Early Republic*, 36 J. CHURCH & ST. 507, 511–13 (1994).

23. See *id.*

24. See *id.* at 513, 526.

25. See GERBER, *supra* note 2, at 35–37.

26. See *id.* at 332–33.

27. See *id.* at 333–36.

Madison might have come to the Philadelphia convention with the “principal objective” of forming a government that would “provid[e] more effectually for the security of private rights,”²⁸ but the delegates were unable to attain this objective in the final Constitution recommended to the States. In fact, the original Constitution had little to say about protecting individual rights. Under the system of federalism cobbled together in Philadelphia, the protection of individual rights such as property rights, contract rights, and freedom from physical harm was by and large left to the state governments.²⁹ Moreover, the original Constitution famously had no Bill of Rights. Even with the addition of the Bill of Rights, it was intended to protect against federal—not state—misconduct.³⁰

Undoubtedly, the Framers were deeply interested in protecting individual rights from government power. As Madison explained, “the great difficulty lies in this: You must first enable the government to control the governed; *and in the next place, oblige it to control itself.*”³¹ The principal objective of the original federal government was to create a strong national government that could deal effectively with national problems like foreign affairs, national security, and foreign commerce. In addition, the federal government was empowered to deal generally with problems of interstate commerce, including uniform national systems of bankruptcy and patent law.³² The creation of a potentially powerful government created a serious ancillary problem: how to “oblige it to control itself.”

Professor Gerber persuasively points to the triumvirate of separation of powers, judicial review, and judicial independence as one of the Constitution’s important “auxiliary precautions,” to use Madison’s words, against government misconduct. In particular, he surely is correct to conclude that as a practical matter, a constitutional structure of judicial independence strengthens the judiciary’s practical ability to override legislative and executive decisions.³³ In this regard, judicial inde-

28. *Id.* at 329–30.

29. See THOMAS B. MCAFEE ET AL., POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS 41–42 (2006).

30. See *id.* at 33.

31. THE FEDERALIST No. 51, *supra* note 1, at 322 (James Madison) (emphasis added).

32. U.S. CONST. art. I, § 8.

33. See GERBER, *supra* note 2, at 333–36.

pendence is a direct and important buttress to the power of judicial review, but is not always necessary for judicial review. Professor Gerber points out instances of judicial review in states that more or less rejected separation of powers and provided the judiciary with little, if any, structural protections. For example, the Connecticut judges in the *Symsbury Case* did so.³⁴ Likewise, in *Holmes & Ketcham v. Walton*, New Jersey judges did the same.³⁵ Cases like *Symsbury* and *Walton* simply establish that judicial independence is not in all situations an absolute prerequisite for judicial review. At the same time, it cannot be denied that judicial independence facilitates the exercise of judicial review. Moreover, Professor Gerber notes that sophisticated members of the founding generation specifically thought so.³⁶

Still, the triumvirate of separation of powers, judicial review, and judicial independence cannot—standing alone—protect any individual rights because these important concepts relate solely to process and are essentially value neutral. These three concepts taken together are entirely silent on the substantive content of individual rights. To take a modern example, if the Constitution enables the President as Commander-in-Chief to override all the limitations in the Constitution, the courts presumably would never challenge presidential action, no matter how extreme, so long as the president actually approved the action. The president's action simply would not implicate separation of powers and judicial review.

The procedural nature of Professor Gerber's triumvirate highlights the significance of the "vertical" origins of judicial review. A vertical hierarchy of laws tells the judiciary where to find substantive limits on government action.³⁷ The Framers believed that ultimate sovereignty came from the people.³⁸ To be sure, exactly *who* "the people" were was not entirely clear. Nevertheless, the Framers understood that the Constitution was intended to limit

34. See *id.* at 340. For judicial independence in Connecticut, see *supra* notes 21–24 and accompanying text.

35. See GERBER, *supra* note 2, at 243–45. For judicial independence in New Jersey, see *supra* notes 14–15 and accompanying text.

36. See GERBER, *supra* note 2, at 333–34.

37. Scott D. Gerber, *The Political Theory of an Independent Judiciary*, 116 YALE L.J. POCKET PART 223, 226 (2007).

38. See MCAFEE, *supra* note 29, at 42–44.

government power.³⁹ Therefore, the substantive constitutional limits that defined individual rights were clear to the judiciary. These limits were literally written into the Constitution.

The actual implementation of judicial review requires the judiciary to interpret the Constitution, and this interpretive function lies at the heart of many of today's constitutional controversies. In the founding generation, the problem of constitutional interpretation was not as significant. Everyone knew that the Constitution came from the people, and the members of the judiciary in the founding generation were themselves political leaders of the very group of people who created the Constitution. The judiciary of the founding generation did not face a serious interpretive problem because it felt that it knew what the people intended.

III. BEYOND JUDICIAL REVIEW

For a number of reasons, many discussions of judicial review unduly exaggerate the power's importance. One reason for this exaggeration stems from a tendency to view twenty-first century society—particularly political society—in terms of conflicts of values and interests. From this viewpoint, the judiciary's—in particular the Supreme Court's—power resides in its ability to resolve conflicts and impose its judgments upon other governmental units.⁴⁰

The structural protections of judicial independence undoubtedly contribute to the judiciary's ability to wield the power of judicial review. But the societal benefits of judicial independence do not flow solely from judicial review. Although Professor Gerber emphasizes the relationship between judicial independence and judicial review in his concluding chapter, he notes that “[j]udicial independence is also valuable in noncon-

39. *Id.*

40. Accordingly, the modern paradigms of great judicial opinions are *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In the former case, Federalist justices, whose coalition was out of power, tweaked the nose of the dominant coalition led by Thomas Jefferson and reaffirmed the Court's authority to use the power of judicial review to overturn political branch decisions. In the latter case, the Court struck boldly at a national disgrace when the political branches were morally paralyzed. In each of these cases, the Court was in conflict with powerful societal forces and firmly reiterated its constitutional role as a shield against abuses of government power.

stitutional cases.”⁴¹ If the power of judicial review did not exist, independent judges nevertheless would play an important restraining role simply by providing a neutral administration of existing laws. For example, the legislature frames many laws that the executive then administers. This paradigm holds for all criminal laws. In a particular case, the executive branch, acting through prosecutors, might wish to give an expansive interpretation inconsistent with the legislature’s general plan. An independent judiciary can more effectively referee the resulting conflict between legislative and executive policy.

In addition, and perhaps of greater importance, rule of law is essential to the effective operation of a market economy like the one in the United States.⁴² Rule of law requires most participants in the market to believe that laws usually will be enforced on a fair and uniform basis. Thus, the structural protections that contribute to judicial independence foster the market’s faith in the judiciary.⁴³ Many years ago, Chief Justice Taft believed that “no single element in our government system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases.”⁴⁴ Ultimately, the contributions of independent judges to the effective functioning of a market system have proven invaluable.

CONCLUSION

Although the United States is an overtly pluralistic society, general consensus is nevertheless possible on some issues. Professor Gerber’s book describes widespread disagreement over the course of some two centuries that eventually converged into a general consensus that the judicial should be independent of the legislative and the executive.

41. GERBER, *supra* note 2, at 334 n.35.

42. See *Economics and the Rule of Law: Order in the Jungle*, ECONOMIST, Mar. 15, 2008, www.economist.com/node/10849115.

43. Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV., Spring 2005, at 1, 2-7 (2005).

44. William Howard Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts*, 47 A.B.A. REP. 250, 259 (1922).